No. 79-956

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In the Supreme Court of the United States

OCTOBER TERM, 1979

FORT VANCOUVER PLYWOOD COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-13) is reported at 604 F. 2d 596. The Board's decision and order (Pet. App. D-1 to D-3, E-1 to E-47) are reported at 235 N.L.R.B. 635.

JURISDICTION

The amended judgment of the court of appeals was entered on September 17, 1979 (Pet. App. B-1 to B-7), and its order denying petitioner's motion for rehearing was entered on September 20, 1979 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on December 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the Company's illegally motivated mass discharge of nonshareholder employees violated Sections 8(a)(3) and (1) of the National Labor Relations Act and did not fall within the liquidation of business exception to liability enunciated in *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

2. Whether the Board properly found that the Company's mass termination of employees and its repeated coercive statements destroyed the conditions necessary for a fair election and therefore that a bargaining order based on the Union's authorization card majority was appropriate.

3. Whether the Board properly refused to reopen the record to adduce additional testimony.

STATUTORY PROVISIONS INVOLVED

Two relevant statutory provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.*, are set forth at Pet. 3. The following provision (29 U.S.C. 158(a)(5)) is also relevant:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. The Fort Vancouver Plywood Company ("the Company") is a worker-owned corporation engaged in the manufacture of plywood in Vancouver, Washington (Pet. App. E-2 to E-3). Not all company workers are

shareholders, however. The Company has employed varying numbers of nonshareholders, who work alongside and interchangeably with shareholders, in all job classifications (Pet. App. E-5, E-35 to E-37).

On June 14, 1976, the Company employed about 335 shareholders and 76 nonshareholders, four of whom were prospective shareholders serving a one-month probationary period before being admitted to shareholder status (Pet. App. E-5). On that date, at a special meeting, the Board of Directors voted to terminate the 72 nonshareholders who were not prospective shareholders,[1] and the Company implemented its decision at the end of the shift in progress (Pet. App. E-11 to E-27). Since that date, the Company has not employed any nonshareholders (Pet. App. E-5).[2]

On June 9, 1976, immediately preceding the mass termination of nonshareholders, Local Union No. 3-3, International Woodworkers of America, AFL-CIO ("the Union") held an organizational meeting at a local restaurant. Seventeen nonshareholders attended the meeting, and sixteen of them signed authorization cards. Other authorization cards were distributed for circulation among the absent nonshareholders. Pet. App. E-6.

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[1]The four prospective shareholders serving probationary periods were excepted from the mass termination (Pet. App. E-5).

[2]The petition states that, shortly after the mass discharge, "the Company's shareholders amended the Corporation's bylaws to preclude any further use of nonshareholder production employees" (Pet. 4). The Company first raised the alleged bylaw change in its post-hearing motion to reopen the record, more than a year after the date of the mass termination (R. 31). The alleged new bylaw was not submitted with that motion, was not presented to the Board, and is not part of the record in this case.

Sometime between June 8 and 10, foreman Harbie Diener observed nonshareholders signing authorization cards in the lunchroom during a break and asked one of them whether he had "signed up for the Union" (Pet. App. E-8; Tr. 320-321, 341-343, 380-381).[3] During a work break on June 13, Ronald Reibel, a member of the Company's Board of Directors, asked a nonshareholder what was "going on with the Union," what "went on" at the June 9 organizational meeting, and "who was behind" the union activity (Pet. App. E-8; Tr. 344-347). On June 14, immediately preceding the Board of Directors' meeting, a nonshareholder asked Plant Superintendent Grenier and supervisor Walt Marugg if he could be switched from graveyard to swing shift. Grenier stated that he did not "see any problem with that." Marugg interjected that the Company had better start "breaking in" the new shareholders "in case these f---ers go union on us." Grenier responded, "If they do, we'll just shut down" (Pet. App. E-7; Tr. 392-393).

After the Directors' meeting, when asked his reaction to the mass termination, supervisor Marugg told several nonshareholders: "You guys asked for it; you just screwed yourselves," or words to that effect (Pet. App. E-9; Tr. 352, 232, 300). Similarly, foreman Diener, when asked the reason for the mass termination, stated: "Well, you know, it was the union stuff (Pet. App. E-9; Tr. 322-324).

By letter of June 14, the Union declared that it had achieved majority status and demanded recognition and reinstatement of the nonshareholders. The Company refused the Union's recognition demand by letter dated

[3]"Tr." references are to the transcript of the hearing before the Administrative Law Judge.

June 15. As of June 16, 41 nonshareholders had signed authorization cards and thereby accorded the Union majority status.[4] The Union repeated its demand for bargaining in a letter of the same date (Pet. App. E-6 to E-7).

2. The Board, affirming the decision of the Administrative Law Judge, found that the Company, through its supervisory personnel, violated Section 8(a)(1) of the Act by questioning employees about their union activities, threatening to replace nonshareholders or to close the plant if it went union, and telling employees that they were laid off because of their union activities (Pet. App. D-1 to D-3, E-7 to E-10, E-40 to E-41). The Board also concluded that the Company's mass discharge of nonshareholders was motivated by anti-union considerations and therefore violated Sections 8(a)(3) and (1) of the Act (Pet. App. D-1 to D-3, E-32 to E-34, E-41). It found that the indicia of improper motivation—timing, knowledge of union activities, animus and failure of the Company's economic defense—were "convincingly present" (Pet. App. E-32 to E-34).

Moreover, the Board found that the Company "perpetrated the most egregious sort of misconduct by its liquidation of the nonshareholder unit; and, in so doing, destroyed any possibility of—and forfeited its right to—an NLRB election as a fair test of employee sentiment concerning union representation" (Pet. App. E-40). Therefore, in addition to requiring reinstatement with backpay for the discharged nonshareholders, and the posting of appropriate notices, the Board, noting that the Union had a clear card majority, ordered the Company

[4]The Board found that at least six cards were signed after the discharges and that at least one of those was backdated to a pre-discharge time (Pet. App. E-38).

to bargain with the Union as the representative of its employees (Pet. App. E-40, E-42 to E-43). The Board also found that, by refusing the Union's repeated demand for recognition, the Company violated Section 8(a)(5) of the Act (Pet. App. E-40, E-41).[5]

3. The court of appeals enforced the Board's order but remanded the reinstatement award to the Board for reconsideration.[6] The court found "more than sufficient evidence" to support the Board's finding that the Company violated Section 8(a)(1) by making coercive statements to its employees (Pet. App. A-3 to A-4). The court also found "ample evidence" that the Company's mass termination of all nonshareholders was unlawfully motivated and further found the "conclusion that a desire to stop unionization outweighed other business purposes * * * reasonable and well-supported" (Pet. App. A-5). The court specifically rejected the Company's contention that, even if illegally motivated, its discharge of all nonshareholders was permissible under *Textile*

[5]The Board also upheld the law judge's refusal to reopen the record for the presentation of allegedly newly discovered evidence (Pet. App. D-2 n.1). The Board agreed with the law judge that the proffered evidence would not shed new light on the validity of the authorization cards. The Board also concluded that the evidence was not shown to have been previously unavailable and that the allegations of more pervasive backdating of cards would not vitiate the validity of the finding of majority status, even if true. Finally, the Board noted that petitioner had delayed making its request for almost two months after its alleged discovery of the new evidence.

[6]Given the record high number of nonshareholders employed on June 14 and the view of three of the seven members of the Board of Directors that the practice of employing nonshareholders should be ended, the court of appeals believed the Board should address the question of how many nonshareholders would have continued to be employed but for the Company's unfair labor practices (Pet. App. A-11). The Board has accepted the remand, and no issue regarding the remand is raised here.

Workers Union v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965). Finding the *Darlington* exception applicable "only to the complete liquidation of a business," the Court held that "[a]nti-union firings that fall short of terminating business operations completely, such as the discharges here, violate section 8(a)(3)" (Pet. App. A-6; citation omitted).

The court upheld the Board's bargaining order, holding that, "in view of the repeated and drastic nature of the coercive behavior and discharges, the [administrative law] judge reasonably concluded that only a bargaining order would effectuate employees' expressed preference for the union" and that an election would not effectuate employee preferences (Pet. App. A-8).

Finally the court concluded that it was "hardly an abuse" of the Administrative Law Judge's "considerable discretion" to refuse to reopen the record to receive the alleged newly discovered evidence (Pet. App. A-7).

ARGUMENT

1. Petitioner no longer contests the finding that it discharged its nonshareholder workers for anti-union reasons, rather than for the economic considerations or policy reasons it urged before the Board. Instead, it contends (Pet. 8-13) that the Board was barred by this Court's decision in *Darlington*, *supra*, from finding its anti-union conduct violative of the Act. *Darlington*, however, has no application here.

In *Darlington*, this Court carved out a very narrow exception to the general principle that an employer's

discharge of workers for anti-union reasons violates Section 8(a)(3) of the Act (380 U.S. at 273-274; footnote omitted):

> We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.

This exception recognizes an "employer's right to go out of business." 380 U.S. at 272. Here petitioner did not cease manufacturing plywood or terminate a distinct portion of its business. It made no structural changes in its enterprise, but continued to operate as before. All petitioner did was discharge those production and maintenance employees who had attempted to unionize and require the remaining work force to shoulder an increased burden in running the continuing enterprise.[7]

2. There is no merit to petitioner's argument (Pet. 15-17) that the rationale of this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), does not apply where a union in fact gains majority strength *after* an employer commits unfair labor practices. In *Gissel*, this Court held that a bargaining order may issue on the

[7]In *Darlington*, the Court held (380 U.S. at 275) that "a partial closing is an unfair labor practice * * * if motivated by a purpose to chill unionism in any of the remaining plants of the single employer * * *." Since there was no partial closing of operations here, the Board was not required to make the latter determination. In any event, employees who are shareholders are employees within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3) (see *Olympia Shingle Co.*, 26 N.L.R.B. 1398, 1414 (1953); *Everett Plywood & Door Corp.*, 105 N.L.R.B. 17, 18-19 (1953)), and, even assuming the amendment to the bylaws petitioner alleges (Pet. 4; see note 2, *supra*), there could be no assurance that the bylaws would not be amended in the future to permit employment of nonshareholders once again. Therefore, petitioner's assertion (Pet. 12-13) that its action could have no purpose to chill unionism in the future is without merit.

basis of authorization cards where the employer's unfair labor practices have a tendency to undermine majority strength and impede the election process. 395 U.S. at 613-614. Here, many of the employees signed authorization cards before petitioner committed the most egregious of its unfair labor practices—the mass termination of nonshareholders. Such an unfair labor practice could reasonably be expected to have an impact on this pre-existing portion of the Union's majority strength. While other of petitioner's nonshareholder employees may have signed authorization cards immediately after their discharge, it is nevertheless likely that in an election, they too would dwell on the fact that petitioner's objection to unionization is so great that it preferred to fire them all rather than deal with a union, and thus be prompted to vote against the Union as the safest means of regaining and retaining their jobs. As this Court stated in *Gissel*, *supra*, concerning the process of validating authorization cards: "any rule that requires a probe of an employee's subjective motivations * * * involv[es] an endless and unreliable inquiry" (395 U.S. at 608).[8] Here, an objective assessment of the unfair labor practices fully supports the bargaining order.

3. Petitioner's further contention (Pet. 13-14) that the Company was denied due process by the Board's refusal to reopen the record raises no issue appropriate for review by this Court. The Board denied the request because no showing had been made that the proffered evidence would affect the outcome or that it was not

[8]Contrary to petitioner's contention (Pet. 17 n.5), the Board set forth its reasons for issuing a bargaining order (Pet. App. E-40), and the court of appeals found the Board's discussion satisfactory and its conclusion reasonable (Pet. App. A-8).

previously available, and, in any event, the request was untimely (note 5, *supra*). The petition merely raises the essentially factual question of whether, on this record, the court of appeals was correct in concluding that the Board's ruling was not an abuse of its broad discretion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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